APPENDIX A.

Opinion—Supreme Court of Ohio.

Syllabus.

1. Under Section 9a of the Sales Tax Act, effective during the calendar year 1935 (115 Ohio Laws, pt. 2, 306 **et seq.**), a penalty was provided against a vendor for failure to collect the tax, or, where he had collected the tax, for failure to cancel the required prepaid tax receipts. The amount of such penalty was to be measured by the amount of tax such vendor failed to collect or for the amount of prepaid tax receipts which he failed to cancel. To establish such personal liability against a vendor, proof must be made of a specific taxable sale or sales upon which the vendor failed to collect the tax, or having collected the tax failed to cancel the proper amount of prepaid tax receipts.

2. Under such Sales Tax Act a tax was levied on each retail sale of tangible personal property not specifically exempted, in an amount dependent upon the price paid. Such tax was to be paid by the purchaser and collected by the vendor, except as provided in Section 5 of the act.

3. Where a specific retail sale of tangible personal property is shown to have been made by a vendor during the year 1935, such sale is presumed to be subject to the tax levied by Section 2 of such Sales Tax Act and the burden of proof to establish the contrary is upon the vendor.

4. Under such Sales Tax Act no authority was conferred upon the Tax Commission of Ohio to assess a vendor according to the average percentage of tax collectible from purchasers on taxable retail sales by other

vendors in like business or by the mathematical probabilities, demonstrated by the bracket tax rates in Section 2 of such act, that the tax collectible on taxable retail sales made by vendors during the year 1935 could not be less than three per cent.

5. The Sales Tax Act effective during the calendar year 1935 did not levy or authorize the levy of a tax on vendors. No tax levy on vendors was provided prior to the enactment by the 91st General Assembly of Section 5546-12a, General Code. (116 Ohio Laws, pt. 2, 77 and 333.)

6. No duty rests upon the Tax Commissioner to levy an assessment against a vendor on account of sales of tangible personal property made during the year 1935 unless such Tax Commissioner is in possession of evidence showing a specific retail sale or sales of nonexempt tangible property upon which the tax was collected by a vendor but for which the proper amounts of prepaid tax receipts were not cancelled by the vendor or for which no tax was collected or prepaid tax receipts cancelled.

7. Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. (**Slingluff v. Weaver**, 66 Ohio St., 621, approved and followed.)

8. There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for.

9. The General Assembly cannot delegate legislative power to an administrative body and any enactment

which in terms does so is unconstitutional and void. (**Matz v. The J. L. Curtis Cartage Co.**, 132 Ohio St., 271, approved and followed.)

10. Under Section 5623, General Code, it was the duty of the Tax Commission of Ohio and is now the duty of the Tax Commissioner to decide all questions that may arise with reference to the construction of any statute affecting the assessment, levy or collection of taxes, in accordance with the advice and opinion of the Attorney General, unless and until such advice and opinion has been annulled or modified by a court of competent jurisdiction.

11. An action in mandamus, to compel a board or officer to perform a duty allegedly enjoined by statute, is a proper proceeding in which to secure the annulment or modification of an Attorney General's advice or cause was tried, in addition to reciting various sections

Statement of the Case.

This case was filed originally in the Court of Appeals seeking a writ of mandamus to compel the Tax Commissioner, as successor of the Tax Commission of Ohio, to make an assessment against each The Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company based upon information in the possession of the respondent.

Plaintiff's second amended petition upon which this cause was tried, in addition to reciting various sections of the 1935 sales tax law and alleging that The Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company were vendors under that act, alleged that the auditing department of the sales tax section of the Tax Commission under the direction of

the chief auditor for the Tax Commission had made an audit for the year 1935 of the books and records and of the records of specific taxable retail sales made by each and all of the more than two thousand retail stores operated in Ohio by The Kroger Grocery & Baking Company and The Great Atlantic & Pacific Tea Company, the report of which audits was delivered to the Tax Commission and which report established that The Kroger Grocery & Baking Company was liable to the state under the provision of Section 9a of the Sales Tax Act for the period of January 27 to September 7, 1935, in the amount of $164,612.17 and that The Great Atlantic & Pacific Tea Company was similarly liable for the period of January 27 to December 28, 1935, in the amount of $276,101.28; and that such report was in the possession of appellant as successor of the Tax Commission of Ohio. It was also therein alleged that the Tax Commission and the Tax Commissioner had arbitrarily failed to make assessments for the reported liability of The Kroger Grocery & Baking Company and The Great Atlantic & Pacific Tea Company. After asking for costs and attorney fees, the second amended petition prayed for a writ of mandamus to issue against appellant as Tax Commissioner "requiring him to make an assessment against The Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company, as vendors, under the Sales Tax Act, effective January 1, 1935 (Sections 5546-1 to 5546-23, inclusive, General Code), based upon the information now in the possession of said defendant as provided by Section 5546-9a of the General Code of Ohio, effective January 1, 1935, that costs may be assessed including an allowance for counsel fees as herein

set forth, and for such other relief in the premises as may be just and proper."

Appellant Tax Commissioner, in his answer to the second amended petition, specifically denied that he was or ever had been in possession or control or that he had any knowledge of the existence of any information showing or tending to show that The Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company, or either of them, collected moneys purported to be in payment of sales tax from customers during the year 1935 for which they, or either of them, failed to cancel prepaid sales tax stamps or to pay such money into the state treasury or that they, or either of them, made taxable sales of personal property during the calendar year 1935 for which they, or either of them, collected sales tax revenue which they, or either of them, did not pay into the state treasury.

Appellant further denied in his answer that any audit had been made supporting a finding that The Kroger Grocery & Baking Company or The Great Atlantic & Pacific Tea Company was indebted to the state under authority of the Sales Tax Act. Appellant's answer also contained the following:

"Defendant, further answering, says that the Tax Commission of Ohio delivered to the Department of Taxation at the time of its creation records purporting to be the records of such commission which reflect that such commission made a determination with reference to the question as to whether moneys were due from such named corporations and reflected a finding and determination of such commission that no moneys were due therefrom for the year 1935. Defendant further says

that in the creation of the office of Tax Commissioner the Legislature did not give to such office or officer the right to review and redetermine the determinations of the former Tax Commission which were not then pending but had been completed and no appeal prosecuted thereto.

"Defendant further says that he has no knowledge of the existence of facts which would justify a determination that moneys are due from such corporations for taxes or other obligations incurred during the year 1935, and that even if the court should determine that he has the power to make an assessment upon the existence of facts sufficient to justify it, he could not in good faith make such an assessment."

As a second defense appellant set up the plea of res judicata based upon the case of **State, ex rel. Foster, v. Miller et al., Tax Commission**, 136 Ohio St., 295, 25 N. E. (2d), 686.

The Court of Appeals allowed an alternative writ of mandamus. Upon the application of relator, a special master commissioner was appointed to take the testimony in writing, report it to the court together with his conclusions on the law and facts involved in the issues. Thereafter such master commissioner made application therefor and was "invested with all the powers of a referee in chancery."

The special master commissioner took the testimony which was reported to the court together with his conclusions of fact and law. With some exceptions the master's report was approved and the Court of Appeals ordered that a writ of mandamus issue as prayed for in relator's second amended petition directing appellant to

make assessments against The Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company.

This case having originated in the Court of Appeals, the appeal to this court was taken as of right.

In December 1934, the 90th General Assembly enacted an act providing for the levy and collection of a tax upon sales of tangible personal property at retail. The act was limited so as to apply only from the first day of January 1935, to and including the 31st day of December 1935. (115 Ohio Laws, pt. 2, 306 **et seq.**)

Section 10 of the act provided that:

"No person shall engage in making retail sales as herein defined, as a business, without having a license therefor * * *."

Such licensee, or vendor as he will hereafter be called, was required to purchase and have on hand at all times prepaid tax receipts in suitable denominations and in amount sufficient to supply the normal requirements of his business.

Section 12 required such vendor to keep records of sales, together with invoices, bills of lading, retained parts of cancelled prepaid tax receipts, and such other pertinent documents, in such form as the commission might by regulation require. These records were to be open to inspection by the Tax Commission and were to be preserved for the period of three years.

Section 15 of the act made it a misdemeanor for a vendor to fail, neglect or refuse to collect the full and exact tax required by the act or to hold out that he was absorbing such tax for the consumer.

However, under Section 5 of the act the Tax Commission of Ohio was empowered to authorize a vendor to prepay the tax levied, and to waive the collection of the tax from the consumer, in cases where the Tax Commission determined that the conditions of the applicant's business were such as to render impractical the collection of the tax in the manner otherwise provided by the act.

Section 2 of the act provided as follows:

"For the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crisis, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this act, an excise tax is hereby levied on each retail sale in this state of tangible personal property occurring during the period beginning on the first day of January, 1935, and ending on the thirty-first day of December, 1935, with the exceptions hereinafter mentioned and described, as follows:

"One cent, if the price is forty cents or less;

"Two cents, if the price is more than forty cents and not more than seventy cents;

"Three cents, if the price is more than seventy cents and not more than one dollar;

"If the price is in excess of one dollar, three cents on each full dollar thereof; and if, in such case, the price

is not an even number of dollars, then, in addition to the said tax on each full dollar thereof, one cent, if the price exceeds an even number of dollars by more than eight cents, but not more than forty cents; two cents if such excess is more than forty cents and not more than seventy cents; and three cents if such excess is over seventy cents.

"If the price is less than nine cents, no tax shall be imposed.

"The taxes hereby imposed shall apply and be collected when the sale is made, regardless of the time when the price is paid or delivered.

"In the case of a sale as herein defined made during said period, the price of which as herein defined consists in whole or in part of rentals for the use of the thing transferred, the taxes hereby imposed shall, as regards such rentals, be measured by the instalments thereof falling due within said period only.

"The tax hereby levied does not apply to the following sales:

"1. When the consumer is the state of Ohio or any of its political subdivisions.

"2. When the vendor is a farmer, the thing transferred is the product of his own farm, or of a farm which he operates, and the retail establishment is located on such farm, or when the sale is of feed, seeds, lime or fertilizer.

"2a. Sale of fluid milk defined by the milk marketing act for consumption off the premises of the vendor and of bread in loaf form.

"2b. The sale of newspapers.

"3. Sales of motor vehicle fuel and of liquid fuel upon the receipt, use, distribution or sale of which in this state a tax is imposed by the law of this state.

"4. Sales of cigarettes and of brewer's wort and malt, upon the sale of which a tax is imposed by law of this state, so long, respectively, as such law is in force.

"5. Sales of beer as defined by Section 6212-63 of the General Code, whether in bulk or in bottles, sales of wine, and sales of spirituous liquors by the Department of Liquor Control.

"6. Sales of artificial gas by a gas company as defined in Section 5416 of the General Code, of natural gas by a natural gas company, as so defined, of electricity by an electric light company, as so defined, of water by a water-works company, as so defined, if in each case the thing sold is delivered to consumers through wires, pipes or conduits; and all sales by any other public utility as defined in Section 5415 of the General Code.

"7. Casual and isolated sales by a vendor who is not engaged in the business of selling tangible personal property.

"8. Sales which are not within the taxing power of this state under the Constitution of the United States.

"Nothing in this act shall be so construed as to impose any tax on the transportation of persons or property.

"9. Professional or personal service transactions which involve sales as inconsequential elements, for which no separate charges are made.

"10. Tangible personal property sold by charitable and religious organizations, the income of which is used in philanthropic activities.

"For the purpose of the proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that all sales made in this state during the period defined in this section are subject to the tax hereby levied until the contrary is established."

Section 3 of the act provided as follows:

"Excepting as provided in Section 5 of this act, the tax hereby imposed shall be paid by the consumer to the vendor in every instance, and it shall be the duty of each vendor to collect from the consumer the full and exact amount of the tax payable in respect of each taxable sale, and to evidence the payment of the tax in each case by cancelling prepaid tax receipts, equal in face value to the amount thereof, in the manner and at the times provided in this section, to wit:

"(a) If the price is, at or prior to the delivery of possession of the thing sold, to the consumer, paid in currency passed from hand to hand by the consumer or his agent to the vendor or his agent, the vendor or his agent shall:

"1. Collect the tax with and at the same time as the price.

"2. Immediately cancel in the presence of the buyer by immediately tearing into two parts a prepaid tax receipt or receipts of the proper face value, deliver one part of each such cancelled prepaid tax receipt to the consumer or his agent, and retain the other part thereof.

"(b) If the price is otherwise paid or to be paid, the vendor or his agent shall, at or prior to the delivery of possession of the thing sold, to the consumer, cancel or cause to be cancelled by tearing into two parts

prepaid tax receipts equal in face value to the amount of the tax imposed by this act. Thereupon and thereby the amount of the tax with respect to such sale, payment of which to the state is evidenced by such cancellation, shall become a legal charge in favor of the vendor and against the consumer, which shall in every case be collected by the vendor, as herein provided, in addition to the price; and at or immediately after such collection, the vendor shall deliver one part of each such cancelled prepaid tax receipt to the consumer and retain the other part thereof."

Section 6 provided for the reimbursement of the vendor in case of returned goods.

Section 9a of the act provided:

"In case any vendor fails to collect the tax herein imposed, or having collected the tax, fails to cancel the prepaid tax receipts in the manner prescribed by this act and by the regulations of the commission, he shall be personally liable for such amount as he failed to collect, or for the amount of the prepaid tax receipts which he failed to cancel.

"In such case the commission shall have power to make an assessment against such vendor based upon any information within its possession or that shall come into its possession. The commission shall give to the vendor written notice of such assessment, together with written notice of the time and place where the vendor may be heard on a petition by him for reassessment. Such notice may be served upon the vendor personally or by registered mail.

"Any amount assessed by the commission under the provisions of this section, together with a penalty of

fifteen per centum thereof shall be due and payable from the vendor to the treasurer of state fifteen days after the service upon the vendor of notice of such assessment and when paid shall be considered as revenue arising from the tax imposed by this act.

"Any vendor, against whom an assessment is made by the commission under the provisions of this section, may petition for a reassessment thereof. Notice of intention to file such a petition or to appear and be heard shall be given to the commission prior to the time the assessment becomes due and payable. A petition for such a reassessment may be filed with the commission on or before the date designated in the notice of such assessment as the time when the vendor may be heard pn a petition by him for reassessment. Each such hearing shall be held at the time and place designated in such notice to the vendor, but the commission shall have power to continue the same from time to time as may be necessary. Each such petition filed with the commission shall set forth specifically and in detail the grounds upon which it is claimed the assessment is erroneous. If no petition for reassessment is filed with the commission, the vendor may nevertheless appear at the hearing and present his objections orally.

"All amounts assessed under this section, which are not paid to the Treasurer of State by the vendor on the date when the same become due and payable, shall bear interest at the rate of twelve per centum per annum from and after such date until paid.

"If any vendor against whom an assessment has been made by the commission, pursuant to this section, shall fail to give due notice of an intention to petition for

reassessment, or to file a petition for reassessment or to appear for hearing, the assessment shall be considered final. The commission by its deputy or deputies authorized by it for such purpose, shall forthwith call at the place of business of such person and in case of refusal to pay such assessment and penalty, on demand shall levy on the moneys, goods and chattels or other personal property of such person wherever found in this state. Such levy shall take precedence of all liens, mortgages, conveyances, or encumbrances hereafter taken on such moneys, goods and chattels, or other personal property. No property of any such person liable to pay the tax, penalty and costs shall be exempt from such levy.

"The commission shall give like notice of the time and sale of the personal property to be sold under this act as in the case of sale of personal property on execution. All provisions of law applicable to sales of personal property on execution shall be applicable to sales under this act, except as herein otherwise provided; all moneys collected by the commission shall be paid into the state treasury.

"The vendor may appeal from an assessment by the commission to the Court of Common Pleas in the same manner and form as that provided in Section 5611-2 of the General Code of Ohio."

The evidence before the special master commissioner disclosed that: There were approximately 300,000 vendors in Ohio who would have many millions of sales during the year 1935; as soon as the sales tax law was passed the Tax Commission began the organization of a department to carry out its provisions; some employees were transferred from other departments while

others were brought in from the outside. As described by some of the witnesses the procedure of the Sales Tax Division "evolved."

The commission issued auditing procedures which the auditors found could not be followed and which were later withdrawn. In this auditing procedure it was stated that the average rates developed from the ST 10 forms filed for the first period showed, Code 11, Grocery-Meat-Vegetable and Fruit Markets, a weighted rate of 3.301. However, some of these reports were found to be inaccurate. The witnesses testified that it was impracticable for a grocer to make a record of each sale.

For the administration of the law the Tax Commission prescribed a report known as ST 10 to be made at regular intervals by each vendor showing the amount of sales made during the period covered by the report. In seeking a basis for checking these ST 10 reports of vendors against the vendors' purchases of sales tax receipts the Tax Commission made a tabulation of the returns of various vendors together with some spot-checks, but no such spot-checks were made in any of the stores of Kroger or The A. & P.

The spot-check was described by the chief examiner of the Department of Taxation, Sales and Excise Divisions, as follows: "Spot-check would be where they would go in and take just a certain period or a certain part of a day, or part of a period and check for that period—we always check on every sale that would go through in that period."

The use of the data on the ST 10 reports was described by the Tax Commission's statistician as follows:

"A tabulation was made of the returns on the sales tax form of all vendors who reported on those forms by code classifications; the total amount of tax stamps cancelled during the period of the first report was divided by the net taxable sales, and a rate for checking purposes only was established. It was not intended at any time that that rate was to be an assessment rate."

By this method the employees of the commission arrived at two test percentages, to wit: 3% and 3.3%. With these test figures as guides as to whether an audi should be made, a large number of audits were undertaken in 1936 resulting in 4,014 proposed assessments. Contrary to the advice of the chief attorney of the Tax Commission some assessments were made. Under assessments made on this basis $187,671.25 was collected from various vendors and later refunded after the receipt by the Tax Commission of an opinion by the Attorney General. Among the audits so undertaken were those of The Kroger Grocery & Baking Company and The Great Atlantic & Pacific Tea Company, each of which concerns had a large number of retail stores throughout Ohio.

On the recapitulation sheet prepared by one of the Tax Commission's examiners, and known as plaintiff's exhibit 13, being a recapitulation of the work sheets of several of the commission's auditors, there was indicated that a 3% rate with a 15% penalty on the sales of The Kroger Grocery & Baking Company for the year 1935 would amount to $164,612.17, while a rate of 3.3% applied to the Kroger sales, together with a 15% penalty, would amount to $265,669.40. The exhibit shows that in the Cincinnati district "10 representative stores of

different districts were taken for three periods," while for the Toledo branch which included stores in Michigan, "132/159 of total was used for Ohio stores." The exhibit purports to set up exempt sales and to give both gross sales and taxable sales. However, its author testified that the examiners "took all sales and exempted anything that was exempt, **not what they had, but what we thought in our opinion.**" (Emphasis ours.) Also introduced were auditor's work sheets and recapitulations concerning the incomplete audit of The Great Atlantic & Pacific Tea Company. These audits do not show individual or specific sales.

Before an assessment was made against The Kroger Grocery & Baking Company a conference was had in Cincinnati with that concern's attorney and Darold I. Greek, chief attorney for the Tax Commission. Attending the conference with Mr. Greek were the statistician and research man for the Tax Commission, the assistant to the chief of the Sales Tax Division of the Tax Commission, a supervisor of the Sales Tax Division, an examiner in the field audit section, and a field audit supervisor. The position of the attorney for The Kroger Grocery & Baking Company is disclosed by the following testimony developed by relator:

"Q. What was the Kroger Grocery & Baking Company through Mr. Marx objecting to about this audit? A. Their position was that this was a bracket tax and that the tax had to be determined upon the basis of the amount due on each individual sale.

"Q. And illustrating or enlarging upon that statement, what was said? A. It was their position that you could not take any arbitrary percentage figure and apply it to total sales to determine tax liability.

"Q. Is that all that was said about that now? A. I don't recall that was all that was said but that was the substance of their position.

"Q. What you are intending to convey to the court is that they objected to a rate of 3.3, or something like that, a weighted rate? A. They objected to any percentage for that reason because they said we did not determine the eight-cent sales, which would be exempt completely from the tax, and we had not and could not determine the number of forty-cent sales, which would be two cents, which is an equivalent of a 2½ per cent rate, and that was the basis of this objection; they said we could not apply the rate of three per cent or more.

"Q. Did they say they did not keep a record of exempt sales? A. They said the audit did not show the exempt sales, or all of the exempt sales. * * *

"Q. Did you make any inquiry as to their other grounds of complaint? A. I don't recall if I did or didn't; I contended that the audit made a **prima facie** case in view of the language I read awhile ago and Section 5546-9**a** of the General Code. * * *

"Q. * * * did you make—I believe you made the statement that the audit established a **prima facie** case for the basis of an assessment; did you say that? A. I said that was my contention.

"Q. Yes, that is what I mean, you said that was your contention. Now, if that be true, can you state why an assessment was not made upon that at that time? A. Yes, I can state why an assessment was not made. We considered the case at length and discussed it; we were not certain that we were right, and Kroger had made a definite statement that if we assessed the tax on the

basis of the audit they would contest it. Under the Ohio statutes the Attorney General was then, and I guess still is, the attorney for the tax officials, so we thought we should consult our attorney and see what he thought of the case. Following that, we requested an opinion as to the validity of assessments based upon audits such as we had in this case. The Attorney General's opinion ruled that such assessments were not valid. We felt we should not make an assessment in view of his opinion because we were bound under the statute to abide by the opinion until it was upset by a court of competent jurisdiction."

At another point this same witness testified in part: "I recall distinctly that Mr. Marx [attorney for Kroger] insisted that they would refuse to pay any assessment based upon that audit." In answer to the specific question: "Do you know, if it [assessment] was not made, why it was not made?"; the witness replied: "It was not made because of an opinion rendered by the attorney general."

The Tax Commission's statistician, when asked what took place at the meeting with the attorney for The Kroger Grocery & Baking Company, testified: "My position at that meeting was that of an observer; I was there to represent the Tax Commission; I was there to listen in more or less to what had to be said by both sides; I took no part or participated in any way, especially or formally, in the audit, the assessment or anything of that sort; at no time in all my years with the Tax Commission did I ever participate in audits or assessments. The general discussion, and this is straining my memory a lot [testimony being given approximately six

years after the conference], was to the effect that an examination had been made of the records which were available at the many branch warehouses and the central office of The Kroger Grocery & Baking Company; that audit had been conducted, as I understood, in many of the branches by Mr. Grove, in part, or under the supervision of directly Mr. Bruskotter, and supervised, at least the general impression was, by either Mr. Redman or Mr. Barthalow or under their instructions. Certain conclusions were reached as to the fact that many of the sales of The Kroger Grocery & Baking Company consisted of non-taxable items. The contention of The Kroger Grocery & Baking Company, as I recall it, was that the audit did not correctly reflect the inclusion of all those non-taxable items. As I recall the attitude of the auditors for the Tax Commission, Sales Tax Division, it seemed to be their feeling that they had included those items. Beyond that point I do not recall that there was any specific differences of opinion except that, due to the inclusion or exclusion of those items in arriving at what constituted a figure for net taxable sales upon which a tax rate were to be based, there was a difference of opinion, and there furthermore was a difference of opinion as to what the tax rate, if any, was to be. That is all. * * *

"Q. I will ask the question; what if anything was said about the so-called rate? A. The whole question of rate was very much up in the air, not only as applied to the Kroger company but as to many other companies. There seemed to be certain ambiguities which did not reconcile themselves. I believe it was the contention of the Tax Commission that the rate of tax was three per cent."

The Tax Commission's statistician testified that similar conferences had been held in the offices of the attorneys for other vendors or in other vendors' own offices.

George V. Sheridan, executive director of the Ohio Council of Retail Merchants, also attended the foregoing conference at the suggestion of a Kroger official. He stated that the meeting was called to be held at the office of the Tax Commission in Cincinnati. The room being too small, the meeting was transferred to a room at the Gibson hotel and later to the office of Mr. Marx, attorney for the Kroger company. Mr. Sheridan testified that he was interested in the principle of weighted rate, about which he had learned from the newspapers and from Kroger's full time office attorney who handled tax matters. He also testified that he was interested in some forty to fifty thousand stores which would be affected by the same principle (weighted average).

As to what transpired at the meeting in the office of Kroger's attorney, the commission's statistician testified: "The general discussion on that was the fact that the rate of tax or the method of applying the tax, the method of the tax applying, was based on a sliding scale on sales of varying amounts; a 40-cent item, taxable item being taxed at one cent would be equivalent to 2½%, and other discussions leading along that line to the fact that there was some dispute as to whether the law in any point was specific in saying that three per cent had to be collected, or whether the rate of tax was evidenced by the cancellation of stamps; a number of people talked about that; I don't recall any one in particular."

Upon further examination by relator's attorney, the Tax Commission's statistician also testified as follows:

"Q. * * * From your having examined those sworn

reports [ST 10 reports], what would you say as to whether or not the vendors in the class in which The Kroger Grocery & Baking Company and The Great Atlantic & Pacific Tea Company were made an accounting to the Tax Commission of taxes collected on retail sales made and tax stamps cancelled for more than three cents on the dollar—* * * .

"The Witness: To make a definite statement on that requires an explanation. First, it must be assumed that the reports of all vendors are correct; many vendors, on the sales tax it is the common practice on that, as on other tax forms and forms which are required to be filled out by one governmental agency or another, to fill in the report improperly; others it is assumed fill out their reports properly; the assumption that the others fill out their reports properly leads you then to group the others together and to calculate or determine the supposed rate of tax that a whole group has made. The flaw in it might be said to be that you have no definite assurance that the amount of tax that they collected is exact in all instances nor the amount of taxable sales that they report is exact in all instances. However, if you assume that the reports are all correct, and the reports referred to were for the first period under which a report was required by regulation in the sales tax law, most of the vendors would probably run in the classification the Kroger company was in, 3%, possibly more, sometimes less, for individual vendors. The aggregate of the vendors, all those vendors, might be considerably higher; that might be due to the fact that you have reports in there that contain misstatements; it wasn't unusual at all to receive additional statements or corrected statements, sometimes, oh, a month or more late, and that

always led you to feel that, well, many of the others reports that are in here are complying with the formality rather than being exact and specific.

"Q. Well, I will put this question again and you can answer it yes or no and then explain it if you want to. Isn't it a fact that your work, that when you did your work and investigated these sworn reports ST 10, and totalled them, that it showed an average collection and accounting on the taxable retail sales of more than three cents on the dollar of vendors in the classification of Kroger and A. & P.? A. Yes, subject to the qualifications I mentioned."

The same witness testified:

"The use of the word 'study' entails a very detailed statistical technique which is carried on through determined sampling, involving all types, large and small, in their proper proportion. Such a study was not conducted. The type of classification was, shall we say, code number, which was set, grouped together heterogeneously, large and small units. A man who operated several retail routes selling grocery products might obtain—might be classified, and probably would be classified, in the same general category as The Kroger Grocery & Baking Company, or as any other large chain organization; so that the use of the word study is the use of a term which in a strict technical sense you are stretching the imagination a bit to say that those were studies; those were tabulations and tallies of reports of vendors. I draw that distinction because I am a statistician and there is that distinction."

In answer to the question: "What do you say now, taking the sales in the grocery business by and large, what do you now say that not 3.3 but 3% was exces-

sive as a proper basis for all taxable sales in the grocery line?''—the statistician answered: ''It would be my opinion that the operations at that time would aggregate three per cent of the net taxable sales.''

The ST form No. 10, Series B, required the following information concerning the operations of the vendors:

Schedule A

	Amount
1. Gross income from all sales of tangible personal property.....To..... 1935	
2. Less sales returns and allowances on which tax was refunded (from schedule C—line 16)	
3. Net sales (line 1 minus line 2)	
4. Less: Exempt sales (from schedule D —line 35)	
5. Balance (line 3 minus line 4)	
Schedule B	
6. Prepaid tax receipts on hand at close of business (date)	
7. Prepaid tax receipts purchased (between dates)	
8. Total of lines 6 and 7	
9. Less prepaid tax receipts on hand at (date)	
10. Net amount of prepaid tax receipts cancelled (between dates)	

Schedule D provided for a report of sales of exempted merchandise.

Following the conference between Mr. Greek and his associates with Mr. Marx, attorney for the Kroger company, the Tax Commission requested an opinion of the Attorney General, the summary of which opinion will be found below in the body of our opinion. In the meantime the Tax Commission adopted the following order:

"June 30, 1936

"In the matter of sales tax assessments.

"This day the commission came on to further consider the matter of making sales tax assessments under both the 1935 and 1936 laws.

"The commission being fully advised in the premises relative to the pending request to the Attorney General for an opinion involving the rights of the commission to make weighted average assessments under the laws in question, hereby orders that pending the receipt of the Attorney General's opinion, no final assessment shall be made involving the use of weighted averages, provided, however, that this entry shall continue in full force and effect until Aug. 1, 1936, at which time the matter shall be further considered, it being the intent and purpose of this order to suspend assessments of the type herein referred to until the date herein set forth.

"The vote resulted: Mr. Dargusch, aye; Mr. Davis, aye; Mr. Dunn, aye; and Mr. Kraus, aye. The order was adopted.

"George A. Edge,
"Secretary.

"Approved, Q. A. Davis,
Chairman."

After the receipt of the Attorney General's opinion the Tax Commission's journal discloses that the following order was made:

September 3, 1936.

"In the matter of assessments of vendors
for deficiencies of Sales Tax Collections
during 1935. Sales Tax Section.

"This day the Tax Commission came on to consider the matter of making assessments against vendors for deficiencies in sales tax collections for the year 1935 and, after due consideration, finds:

"That the Attorney General in Opinion No. 5890 ruled that deficiencies in sales tax collections for the year 1935 can not be ascertained by the use of an arbitrary fixed percentage figure;

"That under said Attorney General's Opinion it is necessary to have evidence which will support a percentage figure before an assessment can be based thereon;

"That in practically all cases the auditors and examiners of the Tax Commission are unable to obtain evidence which will support a percentage figure on which an assessment can be based;

"That in practically all cases, due to the fact that vendors do not have adequate records, it is impossible to ascertain the amount of deficiency in the vendors' sales tax collection without using an arbitrary percentage figure which is illegal;

"That in those few cases where a vendor's records are complete, it would be impractical to make a complete audit to arrive at the exact amount of sales tax deficiency as this would necessitate determining the exact amount due on each sale made by the vendor in the year 1935;

"That in view of the impossibility of making an audit and assessment against the vast majority of vendors for sales tax deficiencies in 1935, it would be unfair and discriminatory to assess those vendors who have attempted to comply with the sales tax law by keeping adequate records when no such audit and assessment could be made against the vendors who have not attempted to comply with the sales tax act and have kept no records.

"That in the great majority of cases audited by the department it is found that the vendor's audit is productive of small amounts of revenue whereas audits of purchasers for taxable purchases have been productive of a far greater volume of revenue than vendors audits and the department can to its financial benefit concentrate on the latter type of audit for the year 1935;

"It is, therefore, ordered that the Sales Tax Section, on and after this date, refrain from making any assessments against vendors for deficiencies in sales tax collections on sales made during the year 1935, and it shall be deemed to have been determined by this journal entry that no deficiency exists against vendors for said period.

"This entry refers to and applies only to assessments against vendors for sales tax deficiencies due on sales and does not refer nor apply to assessments against purchasers. The Sales Tax Section shall continue to assess consumers where practicable for the amount of sales tax which should have been paid on purchases.

"The vote resulted: Mr. Dargusch, aye; Mr. Dunn, aye; and Mr. Kraus, aye.

"The order was adopted.

"George A. Edge, Secretary

"Approved Carlton S. Dargusch
Vice Chairman."

Under date of February 3, 1937, the following order was entered on the Tax Commission's journal:

"In the matter of the assessment of vendors for sales tax deficiencies in the year 1935.

"The commission came on this day to consider the matter of the journal entry of September 3, 1936 entitled 'In the Matter of Assessment of vendors for Deficiencies of Sales Tax Collections During 1935' and the commission being fully advised in the premises, it is hereby ordered that said journal entry be modified so as to authorize the assessment of vendors for deficiencies in sales tax collections on sales made during the year 1935 where the vendor has maintained adequate records from which an audit and assessment can be made. In other respects the journal entry of September 3rd shall remain in full force and effect. Provided, however, that nothing herein shall authorize an assessment based upon an arbitrary percentage figure nor upon a weighted average rate.

"The vote resulted: Mr. Davis, aye; Mr. Dunn, aye; and Mr. Kraus, aye. The order was adopted.

"George A. Edge, Approved, Q. A. Davis,
"Secretary. Chairman."

Opinion.

Turner, J.

Alleging that respondent was in possession of information of specific sales of tangible personal property made by The Great Atlantic & Pacific Tea Company (hereinafter referred to as A. & P.) and The Kroger Grocery & Baking Company (hereinafter called Kroger) during the year 1935, relator sought and the Court of Appeals granted a peremptory writ of mandamus against respond-

ent as Tax Commissioner directing him to make assessments against both A. & P. and Kroger, according to formulae contained in the court's journal entry, the details of which will be discussed later.

Whether the action of the Court of Appeals should be affirmed or reversed by this court will depend upon the provisions of an act providing for the levy and collection of a tax upon the sale of tangible personal property at retail, enacted by the 90th General Assembly (115 Ohio Laws, pt. 2, 306 **et seq.**), which was effective during the year 1935, the principal provisions of which act have been outlined in the foregoing statement of facts.

At the threshold of our consideration of this case we are met with the claim by appellee that:

"On this appeal the Supreme Court is limited to a consideration of the findings of fact and conclusions of law made by the referee, as modified by the Court of Appeals in its entry, since the record does not contain a bill of exceptions, allowed and signed by the referee, as required by law."

As appellant has made no assignment of error in respect of the reference of this case, we shall pass the question with such comment only as is necessary to determine the foregoing question raised by appellee.

Assuming, without deciding, that a Court of Appeals may appoint a referee in mandamus action, we have carefully searched the record and have been unable to find where the Court of Appeals appointed a referee in this case.

The record discloses that on March 25, 1942, the Court of Appeals referred the cause to "Carrington T. Marshall, who is hereby appointed special master commissioner to take the testimony in writing in this case, report it to

the court, and therewith his conclusions on the law and facts involved in the issues." Thereafter the following journal entry appears in the record under date of May 12, 1942:

"This day this cause came on further to be heard upon the application of the special master commissioner for a clearer definition of his authority and the court being duly advised in the premises it is ordered that the said special master commissioner be invested with all the powers of a referee in chancery."

Assuming, but not deciding, that such an order may properly be made in an action in mandamus, the appointment was not thereby changed from special master commissioner to referee. While the findings of fact and conclusions of law are signed as referee, the allowance of the bill of exceptions which was ordered by the Court of Appeals was signed: "Special Master Commissioner with all the powers of a referee in chancery."

At the opening of the hearing before the special master commissioner the following took place:

"The Referee: Now that there may be no question about what I understand my duties to be, I am assigned to hear this as referee.

"Mr. Linton: Let the record show that the defendant understands that the hearing is before Mr. Marshall as special master commissioner and not as referee."

In the **per curiam** opinion of this court in the case of **Neil House Co.** v. **Shafer**, 121 Ohio St., 605, 172 N. E., 374, it was said:

"The consent to refer to a master commissioner being only a consent to a limited reference, cannot be enlarged by the court into a general reference."

In the instant case there was no consent to a reference. The reference was made upon the application of the "plaintiff" under the theory that the parties were not entitled to a trial by jury. Prior to the 1912 Amendments to the Constitution, the appeal of a mandamus case was triable **de novo** in the Circuit Court, not because it was a chancery case but for the reason that the statute authorized a **de novo** trial upon appeal in all cases where the parties were not entitled to a trial by jury. Bates Revised Statutes, 5226. Mandamus is an extraordinary **legal** remedy. 25 Ohio Jurisprudence, 973, 976, Sections 1 and 4.

In the case of **Dillon** v. **City of Cleveland**, 117 Ohio St., 258, 158 N. E., 606, the fifth paragraph of the syllabus reads:

"The Court of Appeals has both inherent and statutory authority to direct a reference **in chancery cases** pending in that court on appeal from the Court of Common Pleas and has power to direct a referee to make findings of fact and report conclusions of law."

The record in that case shows that the parties had consented to the reference. In the course of the opinion Chief Justice Marshall went into the history of reference in Ohio.

After tracing the history of references in Ohio and discussing the early confusion on the subject, it is pointed out in 35 Ohio Jurisprudence, 101, Section 3, that:

"Practically, the effect of a report of a master commissioner upon the mind of the court may not, in a majority of cases, be very different from that of the finding of a referee in a legal reference. But where

the court acts upon a master's report, it is to be regarded as declaring its own conclusions of fact and law; while in acting upon the report of a referee, at least in a legal matter, the court is to be regarded as rendering its judgment upon facts found by the referee, as it would do upon the finding of a jury. Theoretically, therefore, the responsibility of the judge is greater in the case of a master's report than in that of a referee. The master commissioner acts simply and solely for the convenience and information of the court, and his report has no force until confirmed. It differs in this respect from the decision of a referee, which, by the Code, stands as the decision of the court." (This code reference is to procedure in the Court of Common Pleas.)

In 16 Ohio Jurisprudence, 306, Section 146, the practice of reference to a master commissioner is discussed.

In 35 Ohio Jurisprudence, 120, Section 31, it is said:

"Confusion is sometimes caused in the matter of correct procedure in trials before referees largely due to the practice of treating the procedure before master commissioners and the procedure of referees as if they were identical. The two are, however, essentially different, under the provisions of the General Code; and a study of these provisions will eliminate any such confusion."

That the Court of Appeals considered that it had appointed a special master commissioner and not a referee is disclosed by the action of that court in directing its special master commissioner to sign the bill of exceptions and by the court itself duly allowing the bill of exceptions.

We find no error in the allowance of the bill of exceptions prejudicial to the rights of the appellee.

In coming to the merits of this case we shall assume, without deciding, that the case of **State, ex rel. Foster**, v. **Miller et al., Tax Commission**, 136 Ohio St., 295, 25 N. E. (2d), 686, together with further proceedings dismissed under the journal entry of November 20, 1940, furnishes no basis for the application of the doctrine of **res judicata** to all or any part of the present case. We shall also assume, without deciding, that the appellant Tax Commissioner has the right to review and redetermine the determinations of the Tax Commission of Ohio in matters which were not pending at the time such commissioner succeeded to the rights, powers and duties of the Tax Commission and in which matters no appeal was pending when the succession took place. We shall further assume, without deciding, that the Tax Commissioner is governed by no time limit applicable to the present proceeding or to assessments under the law in effect in 1935.

The sole basis for holding that the action of the Tax Commissioner was arbitrary is the master commissioner's definition of the word "arbitrary," to wit: "without legal reason;" and his holding "that a refusal on his [Tax Commissioner's] part to give notices of assessment based upon that theory of law [weighted average percentage rate], must be held to be arbitrary and an abuse of his discretion."

We have thus cleared the decks so that this matter may be disposed of finally.

It will be well to note first what procedure both the Tax Commission and the Tax Commissioner were bound to follow in the premises.

Section 5623, General Code, provides (and so provided at all times here in question):

"The Tax Commission of Ohio shall decide all questions that may arise with reference to the construction of any statute affecting the assessment, levy or collection of taxes, in accordance with the advice and opinion of the Attorney General. Such opinion and the rules, regulations, orders, and instructions of the commission prescribed and issued in conformity therewith shall be binding upon all officers, who shall observe such rules and regulations and obey such orders and instructions unless and until the same are reversed, annulled or modified by a court of competent jurisdiction."

On July 24, 1936, the Attorney General, in response to a request therefor from the Tax Commission of Ohio rendered an opinion addressed to that commission, the syllabus of which reads (Opinions of the Attorney General, 1936, Vol. II, page 1134):

"The Tax Commission of Ohio, in determining the question whether a delinquent sales tax assessment should be made against a particular vendor under the provisions of Section 5546-9a, General Code, and, if so, the amount of such assessment, is required to determine such questions upon such information as it may have or which may come into its possession upon its investigation of the business done and sales made by the particular vendor and of the sales taxes collected and sales tax receipts cancelled by him during the period of time under investigation. The Tax Commission is not authorized under this section of the General Code, or otherwise, to determine the question of such de-

linquency or to make an assessment against such vendor based on an application to the amount of the gross sales receipts of the vendor during such period of time of a weighted average percentage rate determined by the Tax Commission indicating the average amounts of sales taxes properly collectible by vendors generally in that particular line of trade or business as compared with gross sales receipts by vendors generally in such line of trade or business during the period of time under investigation.

"The Tax Commission of Ohio is not authorized under this section of the General Code to make a delinquency sales tax assessment against a vendor for the particular period of time under investigation based solely upon information and evidence obtained by the Tax Commission by means of a subsequent 'spot-check' of the vendor's business and sales made by the Tax Commission. Although the information and evidence obtained by the Tax Commission by means of such 'spot-check' may be both competent and relevant if the conditions obtaining with respect to the business done and sales made by the vendor during the period of such 'spot-check' are comparable in amount, kind and character with the business done and sales made by the vendor during the period of time under investigation, the information and evidence thus obtained should be used with 'any (other) information within its possession or that shall come into its possession,' in determining the question whether any delinquency sales tax assessment should be made against the vendor, and, if so, the amount of such assessment.

"The Attorney General will not assume the prerogative of expressing any opinion as to the constitutionality

of the provisions of Section 5546-12a, General Code, as the same were enacted in and as a part of House Bill No. 572 by the 91st General Assembly." (A supplement to this opinion was later issued but therein consideration was given to the law in effect in 1936. Section 5546-12a, General Code, was not in effect during 1935.)

After making request for the opinion the Tax Commission made the order of June 30, 1936, shown in the foregoing statement. After receipt of the Attorney General's opinion the commission made the orders of September 3, 1936, and February 3, 1937, also set out in the above statement.

Under Section 1464 **et seq.**, General Code, the Department of Taxation, consisting of the Tax Commissioner and the Board of Tax Appeals, succeeded to the functions, powers and duties which were by law devolved upon, vested in and imposed upon the Tax Commission of Ohio.

Therefore, until such opinion of the Attorney General has been reversed, annulled or modified by a court of competent jurisdiction, there was and is no duty resting upon the Tax Commission or its successor, the Tax Commissioner, to take the action sought to be enforced herein by mandamus.

We consider the present action a proper test of the correctness of the foregoing opinion of the Attorney General.

Opposed to the foregoing opinion and advice of the Attorney General is the order of the Court of Appeals in the instant case and particularly that part which we have emphasized as follows:

"It is, therefore, further ordered, adjudged and decreed, that a writ of mandamus issue as prayed for in relator-plaintiff's second amended petition, directing the defendant, William S. Evatt, Tax Commissioner of Ohio, to make an assessment against the vendors, The Great Atlantic & Pacific Tea Company and The Kroger Grocery & Baking Company, as a result of retail sales made by each of said vendors for the year 1935 in the state of Ohio, based upon the following information now in the hands of said defendant, William S. Evatt, Tax Commissioner, to wit:

"1. ST 10 Report of each of said vendors for 1935 in evidence in this case; 2. The report of the auditors of the Tax Commission made from the books and records of each vendor for the year 1935, in evidence in this case; 3. **the average percentage of tax collectible from taxable retail sales, in the business in which two specific vendors herein described are engaged; 4. the mathematical probabilities demonstrated by the bracket tax rates set out in G. C. 5546-2, that the tax collectible on taxable retail sales made by the vendors could not be less than 3%.**

"And computed upon the basis of three (3) per cent of the sales shown to be taxable, and, thereafter give notice thereof, to said vendors, and take each and all further, necessary and additional administrative and legal steps to collect final deficiency assessments against said vendors under the sales tax act as found in House Bill No. 135, G. C. 5546-1 **et seq.**;—all in accordance with the finding and report of the referee, as herein confirmed. * * *"

In the case of **State, ex rel. Foster**, v. **Miller et al., Tax Commission, supra**, wherein the same relator was

seeking a writ of mandamus to the effect, **inter alia**, that the Tax Commission and its members should be required to discharge the specific mandatory duties imposed by law and the Sales Tax Act, it was held:

"* * * in the absence of allegation and proof that an officer or commission charged with the duty of collecting sales taxes has refused arbitrarily to collect the amount due on a specific taxable sale or sales, the writ of mandamus will not lie * * *."

It would seem that the foregoing statement of law should apply here. This statement of the law was apparently accepted by the Court of Appeals as correct in passing upon a relator's first and second amended petitions herein. In referring to the first amended petition the Court of Appeals said: "The amended petition is too general and lacks allegations of specific acts required under the law". In its decision upon the second amended petition the Court of Appeals said: "The amended petition alleges that the commission has refused arbitrarily to collect the amount due on the sales made by these corporations. Whether the petitioner can come within the third syllabus of **State, ex rel.**, v. **Miller** as to the necessary proof that the commissioner has refused arbitrarily to collect the amount due on **a specific taxable sale or sales**, remains to be determined after the evidence has been disclosed." The words "a specific taxable sale or sales" were underscored in the original decision of the Court of Appeals.

Had the Court of Appeals adhered to its view of the law as apparently expressed in the foregoing decision, the judgment of that court necessarily would have been for appellant here and no peremptory writ of mandamus

would have been allowed for the simple reason that the special master commissioner did not find and the record did not disclose a single specific taxable sale or sales upon which the Tax Commissioner had refused arbitrarily or otherwise to collect the amount due. In passing upon the second amended petition, upon which this case was heard, the Court of Appeals was apparently accepting the third paragraph of the syllabus of **State, ex rel. Foster**, v. **Miller et al., Tax Comm.**, 136 Ohio St., 295, at face value.

However, in its final opinion in this case the Court of Appeals said in respect of that case: "As to the third syllabus there arises the question if it was responsive to any proposition of law presented to the court by the pleadings and the facts, but after having given the matter close scrutiny we are of the opinion that in using the term 'specific taxable sale or sales,' the court did not intend to say that it was necessary to prove 'individual' sales. There is a distinction in the two terms which should be applied in the determination of this particular issue."

As to the first part of the foregoing quotation we have already pointed out that this same relator had sought a writ of mandamus against the members of the Tax Commission to compel them to discharge their duties under the same sales tax law with respect to the same sales made by A. & P. and Kroger for the years 1935 and 1936.

As to the latter part of the foregoing quotation, we simply call attention to the fact that that paragraph dealt with **a** specific taxable sale or sales. We are of the opinion that the language used in the third para-

graph of the syllabus referred to means the same as if instead of the word "specific" the word "individual" had been used.

The report of the special master commissioner, which was confirmed by the Court of Appeals, was based upon the following premise of the master:

"The opinion of the Tax Commissioner, as expressed in his testimony in the hearing on this case, that he had no power and that the Tax Commission in 1936 had no power to apply the weighted percentage rate upon an accurate audit is so clearly unsound, that a refusal on his part to give notices of assessment based upon that theory of law, must be held to be arbitrary and an abuse of his discretion."

The special master commissioner reached his conclusion as to the authority of the commission and commissioner to adopt or use a "weighted average percentage" by the application of the doctrine of implied powers announced in the case of **McCullouch v. Maryland**, 17 U. S. (4 Wheat.), 316, 4 L. Ed., 579.

There is no analogy between the powers of the Congress, or any other legislative body, to enact laws and those of an administrative commission which possesses no law-making power. The Federal Constitution contains a delegation of powers to legislate while the Sales Tax Act in question contains a delegation of authority to administer what has been enacted by the General Assembly. Under its rule-making powers (Section 5) the commission had the power to adopt and promulgate such rules and regulations as it might deem necessary to **carry out the provisions** of the act. It should need no citation of authority, in this state at least, to demon-

strate that boards and commissions have no lawmaking power and that under our Constitution no such powers may be delegated.

The special master commissioner and the Court of Appeals, in confirming his report, have held in substance that where the General Assembly has omitted a provision to successfully carry out what the courts may think to be the spirit of the law the administrative body may and should supply that deficiency. We do not subscribe to such view. See **Davis et al., Comm.**, v. **State, ex rel. Kennedy, Dir.**, 127 Ohio St., 261, 187 N. E., 867; **Matz, Admr.**, v. **J. L. Curtis Cartage Co.**, 132 Ohio St., 271, 7 N. E. (2d), 220.

As was said by Chief Justice Marshall in the case of **Cassidy** v. **Ellerhorst**, 110 Ohio St., 535, 539, 144 N. E., 252, 42 A. L. R., 372:

"In approaching the interpretation of statutes imposing taxes, it should be recognized at the outset that the rule of strict construction should be followed, and that, where there is ambiguity or doubt as to legislative intent, the doubt should be resolved in favor of the person upon whom the burden of taxation is sought to be imposed, and that language employed in a taxation statute should not be extended by implication beyond its clear import, or to enlarge its operation so as to embrace subjects of taxation not specifically named. This rule has been declared by this court in **Gray** v. **City of Toledo**, 80 Ohio St., 445, 448, 89 N. E., 12, and **City of Cincinnati** v. **Connor**, 55 Ohio St., 82, 91, 44 N. E., 582; and by the Supreme Court of the United States in **Gould** v. **Gould**, 245 U. S., 151, 38 S. Ct., 53, 62 L. Ed., 211."

Relator puts much emphasis on the fact that a personal liability is provided under Section 9a of the act for retail sales **admittedly** made by a vendor. The record does not disclose the making of any taxable retail sale and certainly none was admitted. The label "personal liability" is merely a polite term for "penalty." Statutes imposing penalties are to be strictly construed. 19 Ohio Jurisprudence, 216, Section 19. Besides, before a liability for the penalty may be established, proof of a taxable sale or sales must be adduced. This is clear from the opening sentence of Section 9a, which reads: "In case any vendor fails to collect the tax herein imposed, or having collected the tax, fails to cancel the prepaid tax receipts in the manner prescribed by this act and by the regulations of the commission, he shall be personally liable for such amount as he failed to collect, or for the amount of the prepaid tax receipts which he failed to cancel."

Administrative rules may facilitate the operation of what has been enacted by the General Assembly but may not add to or subtract from the legislative enactment. It was within the power of the Tax Commission to have prescribed the procedure or method whereby vendors were to make records of or keep track of all sales classified as to the respective tax brackets. This the commission did not do for the reason that such records were impracticable. The commission did prescribe forms of audits and provided for assessments against the vendor according to weighted average rates. So far as the auditing was concerned that was clearly within the powers of the commission but we find no justification in the law for making assessments against vendors according

to a flat rate, a weighted average percentage or any mathematical probabilities.

As stated in 37 Ohio Jurisprudence, 378, Section 106:

"The term 'amendment' implies such addition to or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed." See, also, 50 American Jurisprudence, 16.

We are not here concerned with later amendments, save as they tend to show omissions in or a change from the original act. On December 13, 1935, the 91st General Assembly amended the original Sales Tax Act by the adoption, **inter alia**, of Section 5546-12a, General Code (116 Ohio Laws, pt. 2, 77), which provided as follows:

"When an examination and audit of the vendor's books and records, by the commission and its agents, discloses no separate records of the tax collected from the consumers and the amount of such collections, or that the aggregate collection from consumers is less than three per centum of the vendor's sales, it shall be conclusively presumed that the vendor has failed to collect the tax from the consumer and in such cases the commission shall make a finding and assessment of the amount of tax, plus a penalty of fifteen per centum of the amount thereof, which the vendor should have collected and proceed forthwith to collect the same. Failure of the vendor to pay such assessment and penalty within ten days after the certification thereof shall result in the automatic revocation of the vendor's license and such revocation shall prohibit the vendor from engaging in the business of selling tangible personal property in this state. * * *"

The foregoing enactment was later amended (December 22, 1936, 116 Ohio Laws, pt. 2, 333) and thereafter Section 5546-12a, General Code, provided:

"In addition to the tax levied in Section 5546-2 of the General Code * * there is hereby levied upon the privilege of engaging in the business of making retail sales, an excise tax of three per centum of the receipts derived from all such retail sales, excepting those to which the excise tax imposed by Section 5546-2 of the General Code is made inapplicable by subparagraphs 1 to 12, inclusive, of said section. The tax imposed by this section shall be determined by deducting from the sum representing three per centum of the receipts from such retail sales the amount of tax paid to the state by means of cancelling prepaid tax receipts in accordance with the provisions of Section 5546-3 of the General Code. This section shall not be so construed or applied as to affect any duty of the vendor under Sections 5546-1 to 5546-17, both inclusive, of the General Code, nor the liability of any consumer to pay any tax imposed by Section 5546-2 of the General Code."

Section 5546-12a, General Code, as last above quoted, became effective January 1, 1937. Had it been in effect during the year 1935 it would have required a different conclusion than is necessary here. Our question here pertains only to sales made during the year 1935.

It is reasonable to assume that Section 5546-12a, General Code, was adopted and amended in an attempt to take care of just such situations as were disclosed by the Tax Commission's audits.

Where statutes are ambiguous there is room for judicial interpretation but where instead of an ambiguity there is an absence of enactment, courts are without

power to supply the deficiency. It has been held, too often to need any citation of authority, that in seeking legislative intention courts are to be guided by what the legislative body said rather than what we think they ought to have said.

In the case of **State, ex rel. Methodist Children's Home Association,** v. **Board of Education of Worthington Village School Dist.,** 105 Ohio St., 438, 138 N. E., 865, at page 449 Judge Matthias said: "No decisions are more harmful in their ultimate effects than those wherein the courts attempt, by statutory interpretation, or rather by statutory construction, to provide for a particular situation in a manner believed to be popularly desired, and such unwarranted usurpation of the legislative power merits the condemnation usually accorded it after full and candid consideration and upon deliberate and mature judgment."

We also agree with the statement of Chief Justice Marshall in his dissenting opinion in that case at page 465 wherein he said: "The key to judicial interpretation is the legislative intent * * *."

Where the General Assembly has omitted a provision in an act necessary to make it complete or otherwise advisable, the courts have no power to supply what the court thinks the legislature ought to have enacted.

In the case of **Slingluff** v. **Weaver,** 66 Ohio St., 621, 64 N. E., 574, this court held:

"* * * The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

See, also, 37 Ohio Jurisprudence, 488, 490 and 514 and **Sears** v. **Weimer**, 143 Ohio St., 312.

As stated in 37 Ohio Jurisprudence, 492, Section 269:

"It is not the function of a court to set forth what it thinks the statute under consideration should provide or to give to a statute an operation which the legislature does not intend. The statute may not, under the guise of interpretation, be modified, altered, amended, set aside, disregarded, crippled, nullified, or repealed. There is no authority, under any rule of statutory construction, to add to, enlarge, supply, expand, extend, or improve the provisions of the statute to meet a situation not provided for, or contemplated, thereby, or to substitute other provisions therefore. * * * Nothing may be read into, or out of, the statute which is not within the manifest intention of the legislature as gathered from the act itself."

It must be kept in mind that neither the A. & P. nor Kroger was authorized to proceed under Section 5 of the act whereby the Tax Commission had the authority to authorize a vendor to prepay the tax levied and waive the collection of the tax from the consumer in the manner otherwise provided in the act. What we are dealing with here is the liability of a vendor for the collection of a tax levied against the consumer with a presumption that all sales by the vendor are subject to the bracket tax levied until the contrary is established. The same section in which this provision for presumption is contained (Section 2) is the tax levying section and contains twelve categories of exempt sales. Under the law none of these exempt sales could be presumed to be subject to the tax levied for in specific language the section provides: "The tax hereby levied does not apply to the following sales."

Therefore, there is no basis for making an assessment based upon gross or net receipts against either A. & P. or Kroger **under the law in effect in 1935.**

It was in an effort to correct this apparent loophole in the law that the succeeding General Assembly enacted Section 12a, **supra** which at first provided that when an examination and audit of the vendor's books and records by the commission and its agents disclosed no separate records of the tax collected from consumers and the aggregate collection from consumers was less than three per cent of vendor's sales it should be conclusively presumed that the vendor had failed to collect the tax from the consumer and in such case the commission was authorized to make a finding and assessment directly against the vendor.

It is true that in the ST 10 reports there are reports of exempt sales which are summarized in the recapitulation of the auditor's sheets. The evidence disclosed that the Kroger attorney disputed the amount of exempt sales as determined by the audit.

While the discrepancy between the net sales (gross sales less allowed exempt sales) and the amounts of prepaid tax receipts cancelled may be striking, yet there is nothing in this record which discloses in which brackets or below any bracket (**i. e.**, below nine cents) the sales, if taxable fell. In order that the taxing officials might have had any ground upon which to proceed, it would have been necessary to classify the vendor's sales according to the different brackets and exemptions. Here then would be some basis upon which the presumption of taxability might apply. The record here shows and the special master commissioner found that the A. & P. cancelled stamps in approximately 2.47 per cent of claimed

taxable sales while Kroger cancelled approximately 2.50 per cent of claimed taxable sales. There is no evidence in the record showing whether there were any other vendors whose sales were comparable. There is no evidence comparing A. & P. stores with Kroger stores in the same localities. The record contains no evidence that either A. & P. or Kroger failed to comply with Section 3 of the act.

The record in this case is to be tested by the provisions of Section 9a of the Sales Tax Act in effect in 1935. This section is set out in full in the foregoing statement of facts. The part here material is as follows:

"In case any vendor fails to collect the tax herein imposed, or having collected the tax, fails to cancel the prepaid tax receipts in the manner prescribed by this act and by the regulations of the commission, he shall be personally liable for such amount as he failed to collect, or for the amount of the prepaid tax receipts which he failed to cancel.

"In such case the commission shall have power to make an assessment against such vendor based upon any information within its possession or that shall come into its possession. * * *"

As there is no evidence that either the A. & P. or Kroger collected any tax for which either failed to cancel the prepaid tax receipts in the manner prescribed by the act and the regulations of the commission, we are confronted with the question of whether there is any information within the possession of the Tax Commissioner showing that either of the vendors failed to collect the tax imposed by Section 2 of the act. The ST 10 forms as well as the audits made by the Tax Commission disclose gross sales less returns and the balance of net

sales. They also disclose the net amount of prepaid tax receipts cancelled. Our question is, does this information disclose any sales of nine cents but of not more than forty cents on which one cent tax should have been collected; or does it disclose any sales of more than forty cents and not more than seventy cents on which two cents tax should have been collected; or does it disclose any sales of more than seventy cents but not more than one dollar on which three cents tax should have been collected; or does it disclose any sales in excess of one dollar upon which the prescribed tax was not collected.

The court below has held that the liability of vendors under Section 9a of the act may be proved by the application to the net sales, as determined by the commission's audits, of the average percentage of tax collectible from taxable retail sales in the business in which the two specific vendors are engaged, and/or by the mathematical probabilities demonstrated by the bracket taxes set out in Section 5546-2, General Code, that the tax collectible on the taxable retail sales made by the vendors could not be less than three per cent. The so-called average percentage of tax collectible referred to by the court below is based upon unverified data which the evidence clearly shows to be unreliable. There is no evidence that any spot-checks were made in any of the stores of either A. & P. or Kroger. The testimony showed that while the records of these concerns were very complete and adequate to cover the matters required by the regulations of the Tax Commission under Section 12 of the act, like other grocery stores such records were not broken down as to individual sales so that the tax due upon the respective specific sales could be shown. It was shown by the witnesses who testified on the subject

that it was not practical for such concerns as A. & P. and Kroger to keep a record of each taxable retail sale. Whatever may be said about the possibility or practicability of such merchants making and keeping records of each small sale or the possibility or practicability of auditing such records, the matter must be dismissed for the reason recognized but not followed by the special master commissioner and the court below, **i. e.**, neither the law nor the regulations of the commission required the keeping of such records.

We have read every word of the record and have been unable to find evidence of a single taxable sale having been made by either A. & P. or Kroger in which the proper amount of sales tax receipts were not cancelled. In appellee's brief it is said: "We freely concede that no evidence was offered of any individual sale or sales."

As there is no evidence of any information in the hands of appellant or his predecessor outside of the ST 10 reports and the audits showing total sales, our question is narrowed to whether under the Sales Tax Law in effect in 1935 (115 Ohio Laws, pt. 2, 306 **et seq.**), the Tax Commissioner may be compelled by mandamus to base an assessment against either or both A. & P. or Kroger upon "the average percentage of tax collectible from taxable retail sales, in the business in which two specific vendors herein described are engaged," or "the mathematical probabilities demonstrated by the bracket tax rates set out in G. C. 5546-2, that the tax collectible on taxable retail sales made by the vendors could not be less than 3%." To each of the alternatives in the foregoing question, the answer is clearly no.

We are of the opinion that the record discloses no information in the possession of the Tax Commissioner

upon which an assessment may be made against either A. & P. or Kroger. The special master commissioners's finding of law No. 4 should not have been confirmed even as modified. Therefore, the judgment of the Court of Appeals should be and hereby is reversed and the cause dismissed at relator's costs.

Judgment reversed.

Weygandt, C. J., Matthias and Bell, JJ., concur.

Zimmerman and Williams, JJ., dissent.

Hart, J., not participating.

Zimmerman and Williams, JJ., dissenting. The divergence of opinion between the majority and minority can be made plain in a few words.

The principal divergence is based upon the necessity or lack of necessity for information as to specific sales. The majority takes the view that the presumption as to taxability provided for in Section 5546-2, General Code, applies only when the Tax Commissioner has information as to such specific sales. The minority is of the opinion that the presumption applies to all sales regardless of the specific amount of any sale or sales and therefore to the total amount of all sales. The part of Section 5546-2 covering presumption read thus:

"For the purpose of the proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that all sales made in this state during the period defined in this section are subject to the tax hereby levied until the contrary is established."

The Tax Commissioner was not required to act upon the presumption alone but had before him uncontradicted

evidence which showed that The Kroger Grocery & Baking Company and the Great Atlantic & Pacific Tea Company, operating chain store businesses in Ohio in the year 1935, had failed to pay tax upon retail sales in the sum of approximately three quarters of a million dollars. Under Section 5546-9a, General Code, the Tax Commission had power to make an assessment against such companies "based upon any information within its possession or that shall come into its possession." The Tax Commissioner as successor to the Tax Commission has like power.

As applied to the specific facts in the case at bar, it is the opinion of the minority that when the Tax Commissioner was confronted with uncontradicted proof that the taxpayers involved here had not paid their sales tax, it was the duty of such commissioner, acting **ex parte**, to make an assessment in accordance with evidence before him and notify the taxpayers. There is no question that the taxpayers could then appeal. Section 5611, General Code, also gives to the state or a county the right of appeal from a decision of the Tax Commissioner favorable to the taxpayer. Such appeal may be taken "by the Director of Finance of the state of Ohio if the revenues affected by such decision would accrue primarily to the state treasury; or by the county auditors of such counties, if any, to the undivided general tax refunds of which the revenues affected by such decision would primarily accrue." Due to the fact that the Tax Commissioner refused to make the **ex parte** assessment no hearing has ever been had.

The minority is in accord with the majority that under Section 5623, General Code, the wrong or erroneous advice of the Attorney General is not a defense to a man-

damus proceeding brought to compel the tax commissioner to perform a duty which the law "specially enjoins" upon him in his official capacity.

Any other divergence of opinion between the majority and the minority is minor and not of controlling importance.

In our opinion the judgment of the Court of Appeals should be affirmed.